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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSEPH FIELDING, Plaintiff and Respondent, v. JOSEF FRIWAT, Defendant and Appellant.	G039920 (Super. Ct. No. 06CC06564) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Wellman & Warren, Scott W. Wellman and Stuart Miller for Defendant and Appellant.

Carroll & Werner and Lee G. Werner for Plaintiff and Respondent.

Josef Friwat appeals from a judgment against him awarding Joseph Fielding $1,129,000 compensatory and $200,000 punitive damages in this fraud action arising out of Fielding's purchase of a gas station from Friwat. On appeal, Friwat contends: (1) the verdict is not supported by substantial evidence as Fielding did not prove reasonable reliance; and (2) the compensatory damages were excessive. We reject his contentions and affirm the judgment.

BACKGROUND

Fielding sued Friwat and Friwat's business associate, Aram Pashaian, alleging several causes of action arising out of Fielding's purchase of a Long Beach gas station business from Friwat.[1] The business included a gas station, a convenience store, and facilities for a drive through fast food restaurant. The gist of Fielding's complaint was Friwat misrepresented the profitability of the gas station and, knowing Fielding intended to open his own fast food restaurant on the premises, failed to disclose to him that the existing fast food restaurant had a five-year lease with an option to renew for another five years. Fielding also claimed Friwat and Pashaian thwarted his subsequent attempts to sell the gas station. Friwat cross-complained against Fielding for, among other things, breach of contract.

The trial court bifurcated liability and damage phases. Various causes of action from the complaint and cross-complaint were dismissed (or nonsuited) at trial. After presentation of evidence in the liability phase, the matter went to the jury on the following causes of action: Fielding's causes of action against Friwat for fraud and negligent misrepresentation; Fielding's causes of action against Friwat and Pashaian for negligent and intentional interference with business relations; and Friwat's causes of action against Fielding for breach of contract.

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[1] Fielding also sued the title insurance companies involved in the transaction. They obtained a summary judgment, which we affirmed in our prior unpublished opinion *Fielding v. Gateway Title Company* (July 23, 2008, G039334).

The jury returned a series of general verdicts.[2] It found in favor of Fielding on his causes of action for fraud, negligent misrepresentation, and intentional and negligent interference with business relationships. It found Fielding had proved by clear and convincing evidence Friwat acted with malice or oppression in committing fraud. The jury returned a verdict in favor of Fielding on Friwat's cross-complaint.

The court next conducted a jury trial on compensatory damages. After presentation of evidence of damages, the court ordered a nonsuit on the intentional and negligent interference with business relationships causes of action because Fielding presented no evidence of damage as to those causes of action. The jury returned a general verdict awarding Fielding total compensatory damages of $1,129,000. Following a third phase trial on punitive damages, the jury awarded Fielding $200,000 in punitive damages against Friwat.

FACTS[3]

The Friwat/Wardlow Transactions

Prior to 2003, Kent Snyder and his corporation, Wardlow Enterprises, Inc. (hereafter collectively "Wardlow"), owned a Conoco Phillips/Union 76 (CP) service station in Long Beach, and the land upon which it was situated. The business was comprised of the gas station, a convenience store, and a facility for a fast food restaurant.

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[2] Although the verdict form was titled "special verdict," it simply asked the jury as to each cause of action whether Fielding or Friwat had proven that cause of action leaving a place for the jury to respond "yes" or "no," making it "unmistakably a series of general verdicts. [Citation.]" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7.)

[3] Although Friwat's opening brief essentially recites only the facts supporting him, we summarize the evidence supporting Fielding as the prevailing party, and do so in the light most favorable to him, drawing all reasonable inferences and resolving all conflicts in his favor. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925 (*Nestle*).)

On January 1, 2003, Wardlow leased the fast food portion of the premises to Mehrab Behvandi, to operate a fast food restaurant—Louisiana Fried Chicken. The Behvandi lease had a five-year term, plus one five-year option term. Behvandi's rent was between $2,500 per month and $3,500 per month, depending on the net sales of the fast food business.

On April 1, 2003, Wardlow turned the business over to Friwat by entering into a lease for the real property (the Friwat/Wardlow lease). Pashaian was a business associate of Friwat's who helped manage the Long Beach station and other businesses for him.

The Friwat/Wardlow lease described the demised property as "gas station/convenience store/fast food operation (subject to lease)." The Friwat/Wardlow lease was for a five-year term, and the base rent for the premises was $16,500. In an addendum to the Friwat/Wardlow lease, executed the same day, Friwat acknowledged receipt of the Behvandi lease and the rents due under the Behvandi lease were assigned to Friwat. Friwat was also granted an option to purchase the real property at any time during the lease term for $3 million. At trial, Friwat testified when he took over the station, he knew Wardlow was suffering $8,000 to $10,000 a month in losses, but Friwat claimed the losses were due to rampant employee "theft."

The Fielding Transaction

In November 2004, Fielding responded to an advertisement for the sale of the gas station business. He and Mike Ladkani, a real estate agent, met with Friwat and Pashaian in December 2004.

Fielding testified that at their first meeting, he specifically asked Friwat about the fast food restaurant, advising Friwat he wanted to open his own restaurant. Friwat told him the current tenant had only a month-to-month tenancy. And, Friwat said he had been talking to other (more lucrative) vendors for the site, including Starbucks. When Fielding said he was concerned about the high lease payment he would be

assuming from Friwat ($16,500 per month), Friwat told him the fast food portion of the business was under utilized—other vendors could bring in much more rent than Behvandi was paying.

Fielding and a CP representative both testified that in subsequent meetings with Fielding, Friwat, and the CP representative, they frequently discussed the income potential for the fast food facility and the possibility of bringing in a national chain, and Friwat never mentioned that Behvandi had a five-year lease. Fielding testified that when he entered into the transaction, the ability to operate the fast food business himself was a major motivation.

At the end of December 2004, Friwat and Fielding executed a business purchase agreement and joint escrow instructions whereby Fielding agreed to purchase the gas station business from Friwat for $625,000. The business purchase agreement, comprised of Fielding's offer and Friwat's counteroffer, envisioned that Fielding would enter into a sublease for the gas station premises (i.e., via the Friwat/Wardlow lease), although no terms were specified. It provided Friwat was to provide Fielding with various financial records and tax returns for the business and would have a 10-day due diligence period. The purchase agreement recited that both buyer and seller were represented by Ladkani. The agreement also required that Fielding's purchase of the gas station be approved by CP.

Additional escrow instructions were signed by Friwat and Fielding on March 9, 2005. They stated escrow was to close March 15, 2005, Fielding would sign a sublease with Friwat for the premises, and Fielding would have the option to purchase the land for $3.1 million, through a double escrow involving Snyder, on or before August 31, 2005. The instructions also stated Fielding had inspected the premises and its books and records, had conducted an independent investigation of the business, and was satisfied with the business operations. The instructions stated there "were no representations

between" Fielding and Friwat, not already set forth in the instructions or purchase agreement, which superseded any prior agreements.

Pashaian and Friwat prepared the sublease agreement for the station that was executed by Friwat and Fielding on March 14, 2005. The recitals in the sublease stated Fielding desired to lease the premises to "operate thereon a gasoline service station and fast food shop with drive through." The use provision of the sublease stated Fielding could use the premises to operate a gas station, convenience store and fast food restaurant. The sublease made no mention of the Behvandi lease. At trial, Friwat testified he was aware when he presented it to Fielding the sublease did not refer to the existing lease between Wardlow and Behvandi. Although the omission concerned Friwat at the time, he reasoned that by assigning the Behvandi rent to Fielding, Fielding was getting the benefit of his right under the sublease to operate a fast food restaurant from the premises.

Fielding testified the gas station was managed by Friwat's brother. For about one and one-half months before escrow closed, Fielding was at the station up to four times a week for a few hours each day. But Friwat only allowed Fielding limited access to the store during that time—Fielding essentially stood by the cash register and observed. Whenever Fielding asked for financial records, he was told they were not on site, or unavailable because Friwat was required to deposit all money into, and operate the business through, Wardlow's existing accounts (because Wardlow was still the licensed CP dealer).

In February 2005, Friwat gave Fielding a 2004 preliminary financial statement for the business, prepared by Pashaian, showing 2004 net profit of over $270,000. Also during this time, Pashaian helped Fielding prepare a business plan to present to CP, to obtain its approval of the sale. The business plan referred to Fielding as having been the on-site manager of the station, but Fielding testified that statement was

only made to make him look better as a purchaser. The plan also referred to the current monthly rent on the fast food facility as part of the income of the business.

Before escrow closed, Friwat told Fielding he should not talk to Behvandi about the fast food facility because he and Behvandi had a poor relationship, and Behvandi was also trying to negotiate to acquire the station from Wardlow. Fielding asked Friwat to serve Behvandi with a 30-day notice terminating his month-to-month tenancy so Fielding could start his own fast food business as soon as escrow closed. Friwat told Fielding he should wait for a while—advising he should first learn the gas station business before jumping into a restaurant business as well. Fielding thought this was good advice, so he never spoke to Behvandi.

Escrow closed and Fielding took over the business on March 14, 2005.[4] In April, he called Friwat and said he was planning on giving Behvandi a 30-day notice to terminate his tenancy, which Friwat said sounded like a great idea. But a few days later, Pashaian and Friwat's brother showed up at the station. Pashaian handed Fielding a copy of the Behvandi lease saying, "'[Friwat] wanted me to give this to you.'" Fielding became very upset. When he asked what the document meant, and it looked like a lease for the fast food restaurant, Pashaian laughed and said it was between Fielding and Friwat.

Fielding then had his first conversation with Behvandi who confirmed he had a five-year lease plus a five-year option to renew. Fielding called Friwat who denied he had any knowledge of the Behvandi lease—he had just assumed it was month-to-month tenancy. Friwat promised to remedy the situation. When Fielding complained he would never have bought the gas station business without the right to operate his own fast food restaurant, Friwat suggested he consider listing the business for sale because Friwat knew of other potential buyers.

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[4] The gist of Fielding's action against the title companies was that they negligently allowed the escrow to close when certain conditions had not been met.

The Failed Prime Oil Management Sale

In May 2005, Fielding listed the business for sale through a broker named Wendi Wei. By the summer, she had obtained an offer from Prime Oil Management to purchase the business and the real property for $4.1 million. In early August, Pashaian contacted Wei on Friwat's behalf and advised her Fielding did not have any right to sell the real property and Friwat was the only person who had any legal rights to sell the property because it was Friwat who had the option to purchase from Wardlow. Pashaian advised Wei of the terms on which Friwat would sell the property and instructed her that her commission would have to be split between them (i.e., Wei and Pashaian). At trial, Pashaian admitted he had drafted the agreement whereby Fielding was granted the option to purchase the property until August 31, 2005, but Friwat had told him Fielding had somehow waived his right to exercise that option. The Prime Oil Management deal fell through.

Fielding continued to try to sell the business (without the land) through another broker, Beth Duncombe. Friwat would not provide Fielding with any of the financial documents for Fielding to demonstrate the viability of the business.

By the end of 2005, Fielding was heavily in debt trying to keep the business afloat. Fielding had discovered the expenses were $10,000 to $11,000 a month higher than listed in the 2004 preliminary financial statement Friwat had provided prior to close of escrow. He signed a dealer agreement with CP in November 2005, believing it was imperative to have a name brand gasoline to sell if the business were to have any chance of surviving. Fielding's business limped along through most of 2006, with Fielding borrowing money and unable to pay bills. He made one more attempt at selling the business (for less than he had paid), to no avail. In November 2006, he abandoned the business.

Compensatory Damage Phase

Fielding testified that in addition to the original $625,000 he paid for the business, he paid Friwat another $49,000 for inventory. He had paid a $45,000 deposit to CP when the dealer agreement was signed in November 2005. His dealer agreement with CP contained a liquidated damages provision—$12,000 a month for every month remaining on the term of the agreement after he ceased doing business. As of trial, he owed CP $360,000 in liquidated damages. He still owed family and friends about $99,000 he had borrowed to keep the station afloat.

Lewis Finkelstein, a certified public accountant, provided expert testimony as to Fielding's damages. He prepared a schedule of damages that was received into evidence as exhibit 50. In his schedule, Finkelstein came up with two separate damage calculations. The first damage total was $1,554,080. Finkelstein reached that figure based on the costs and expenses Fielding incurred or was responsible to pay as a result of owning the station. The figure included the initial purchase price plus closing costs less cash received back by Fielding after close of escrow; the cost of inventory; the monthly cost of a manager (i.e., $5,000 a month Fielding would have had to pay a manager had he not been running the business himself); liquidated damages owed to CP ($360,000); sales tax liability owed the State of California (one assessment for $133,185 and another for $43,329); underground storage fees ($27,156); and statutory interest. Finkelstein reduced the damage figure by amounts Fielding said he had taken out of the business. Finkelstein's alternative damage calculation of $2,814,474 was based on what Fielding would have made over approximately 10 years had the station's profits been as represented by Friwat on the 2004 preliminary income statement plus interest. Friwat presented no evidence during the compensatory damage phase.

Punitive Damages

In the punitive damage phase of the trial, Friwat testified his net worth was $1.2 million. Fielding put into evidence a financial statement Friwat signed under

penalty of perjury one year earlier stating his net worth was almost $7 million. He also introduced evidence that after Fielding abandoned the business, Friwat purchased the property from Wardlow for $3 million. Right before trial, Friwat sold the gas station business and land to Prime Oil Management for $4,550,000, and after paying off his loan, received about $2,200,000 in cash from the sale.

DISCUSSION

Friwat challenges the sufficiency of the evidence to support the jury's findings on the fraud and misrepresentation causes of action—attacking the reasonable reliance element. He also contends the compensatory damages awarded are excessive.

We apply the substantial evidence standard of review. "In reviewing the evidence on [an appeal challenging the sufficiency of the evidence,] all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) In addition, "[a]ll issues of credibility are likewise within the province of the trier of fact." (*Nestle, supra,* 6 Cal.3d at pp. 925-926.)

1. Fraud/Misrepresentation

"The elements of a cause of action for fraud and a cause of action for negligent misrepresentation are very similar. Pursuant to Civil Code section 1710, both torts are defined as deceit. However, the state of mind requirements are different. 'Fraud is an intentional tort, the elements of which are[:] (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and

(5) resulting damage. [Citation.]' [Citation.] Negligent misrepresentation lacks the element of intent to deceive. Therefore, '"[w]here the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." [Citation.]' [Citations.]" (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 85-86, fn. omitted.)

Friwat challenges the justifiable reliance element. He argues there is insufficient evidence to support a finding Fielding reasonably relied on Friwat's misrepresentations concerning the fast food restaurant space or the financial condition of the business. The reasonableness of the reliance is generally a question of fact and we defer to the jury's findings unless "reasonable minds can come to only one conclusion based on the facts. [Citation.]" (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843.)

First, Friwat asserts it was uncontroverted Fielding was a sophisticated investor who understood the necessity of conducting an independent due diligence review before closing escrow, thus as a matter of law he could not have reasonably relied on Friwat's misrepresentations about the financial condition of the gas station business. Friwat ignores Ladkani's testimony Fielding was unsophisticated and other evidence Fielding lacked any experience in the kind of business he was buying—requiring Pashaian to guide him in preparing a business plan to obtain CP approval of the transfer.

Furthermore, the seller of a business is in a superior position with regard to knowledge of the profits and expenses of the business. (*Rogers v. Bill & Vince's, Inc.* (1962) 203 Cal.App.2d 292, 298.) "Where the representation has to do with the volume of business, income or profits and the facts are peculiarly within the knowledge of the seller, the buyer is entitled to rely upon such statements and is not bound to make an independent investigation. [Citations.] [¶] The making of an independent investigation or the examination of the property does not preclude reliance on the representations where the person making the statements has a superior knowledge or the falsity would not be apparent from an inspection [citation]." (*Ibid.*)

Friwat also contends Fielding could not have relied on misrepresentations (or concealment of facts) concerning the availability of the fast food restaurant space. Ladkani testified he knew about the Behvandi lease, received a copy of the lease, and gave the lease to Fielding. Friwat argues that through Ladkani, Fielding had actual of knowledge of the lease. And even if Ladkani did not tell Fielding about the lease, Fielding was bound by his agent's knowledge of the lease. Additionally, Friwat argues, Behvandi testified he spoke to Fielding before escrow closed and Fielding was aware of Behvandi's lease. But the jury was not required to believe either witness. A "jury is not required to believe the testimony of any witness, even if uncontradicted." (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.) Fielding testified he did not receive the lease, nor was he ever told about it until a month after escrow closed when Pashaian gave him a copy. The fact Friwat presented Fielding with the sublease expressly referring to Fielding's right to use the premises for a fast food restaurant serves to corroborate Fielding's version of the facts—that he was not told and did not know about the lease.

Finally, Friwat argues Fielding failed to prove he was harmed by misrepresentations about the restaurant space. To prove he was damaged, Friwat argues Fielding had to prove he had the ability to earn more from the space unencumbered by Behvandi's lease. He cites no authority for his proposition. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [appellate court not required to consider points not supported by citation to authorities or record].) Furthermore, Friwat is simply rearguing the case he made before the jury. Fielding was not required to prove each specific misrepresentation caused specific harm. He presented evidence demonstrating he was induced to buy the gas station business from Friwat based on Friwat's misrepresentations concerning the finances of the business and that the existing fast food restaurant was only a month-to-month tenant, when in fact the tenant had the right to occupy the space for up

to 10 years. It turned out the business was not as profitable as Friwat represented and Fielding was not able to utilize the restaurant space to increase its profitability.

B. Compensatory Damages

Friwat contends there is no substantial evidence to support the amount of compensatory damages the jury awarded Fielding. We disagree.

Citing Civil Code section 3343, Friwat argues the measure of damages recoverable by Fielding for fraud was out-of-pocket damages—i.e., the difference between the purchase price Fielding paid for the gas station and the actual value of the business at the time it was purchased (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 567-568), plus any additional "[a]mounts actually and reasonably expended in reliance upon the fraud." (Civ. Code, § 3343, subd. (a)(1).)

Applying the out-of-pocket measure, Friwat complains the damages awarded were unreasonable. To the extent the award included sales taxes ($133,185) and underground storage fees ($27,156) Fielding still owed to the State of California, Friwat argues that by claiming those items Fielding essentially admitted theft and tax evasion so the tax liabilities should not have been included. He argues that to the extent the award included the $360,000 in liquidated damages owed to CP, that amount should not have been included because CP has not commenced legal action against Fielding making it unclear he will ever be forced to pay the liquidated damages. And to the extent the award included the full amount Fielding paid for the business ($625,000), Fielding was only entitled to the diminution in value attributable to the premises' encumbrance by the Behvandi lease, less the monthly rent Fielding was already receiving from Behvandi—a difference Friwat claims is nominal at best.

Friwat ignores that lost profits are also an appropriate measure of damages for fraud. (Civ. Code, § 3343, subd. (a)(4).) He has not included the jury instructions that were given in the record on appeal. A review of the reporter's transcript reveals that without objection from Friwat the jury was given Judicial Council of California Civil

Jury Instructions CACI No. 1920 "Buyer's Damages for Purchase or Acquisition of Property," modified by omitting the final two paragraphs from the pattern instruction and adding to it the last paragraph of CACI No. 1923 "Damages—'Out of Pocket' Rule." As so modified, the instruction would have advised the jury on the out-of-pocket measure of damages, i.e., that Fielding was entitled to recover the difference between what he paid for the business and its fair market value, plus amounts reasonably spent in reliance on Friwat's fraud if those amounts would not otherwise have been spent.

But the jury was also instructed with CACI No. 1921, "Buyer's Damages for Purchase or Acquisition of Property—'Lost Profits,'" without objection. On appeal, Friwat does not contend the instruction was erroneously given, or that this was an improper measure of damages. The pattern instruction reads: "[Plaintiff] may recover damages for profits [or other gains] [he/she/it] would have made if the property had been as represented. [Plaintiff] can recover these profits [or other gains] only if [he/she/it] has proved all of the following: 1. That [plaintiff] acquired the property for the purpose of using or reselling it for a [profit/gain]; 2. That [plaintiff] reasonably relied on [defendant]'s [false representation/failure to disclose/promise] in entering into the transaction and in anticipating [profits/gains] from the use or sale of the property; and 3. That [defendant]'s [false representation/failure to disclose/promise] and [plaintiff]'s reliance on it were both substantial factors in causing the lost profits. [¶] You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss."

Fielding presented expert testimony from Finkelstein on compensatory damages; Friwat presented no evidence on damages. Finkelstein prepared a schedule of damages, that was received into evidence as exhibit 50, Friwat omitted this evidence from his appellant's appendix, but it has been included in Fielding's respondent's appendix. In his schedule, Finkelstein came up with two separate damage calculations. The first damage total was $1,554,080, based on the costs and expenses Fielding incurred

or was responsible to pay as a result of owning the station. Finkelstein's second damage calculation of $2,814,474 was based on Fielding's lost profits. (The preliminary income statement Friwat gave Fielding stated the station was generating $270,000 in net profit after operating expenses.)

"'Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.]' [Citation.]" (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.) Further, the selection of which measure of damages "is most appropriate is within the sound discretion of the trier of fact[.]" (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 599.)

It is possible the jury applied the lost profits measure of damages when fashioning its award. Furthermore, it is conceivable the jury arrived at its award by taking Finkelstein's estimate as to the profits Fielding would have made had the net income been as originally represented by Friwat, but subtracted amounts Fielding put into the business plus his liabilities as a result of owning the business from which he had to walk away (i.e., the first damage total). In other words, the jury may have reasonably concluded the damages represented by Finkelstein's first calculation (everything Fielding put into the business or still owed as a result of owning it) were the amounts Fielding would have had to invest in the business to earn the profits he anticipated and represented by Finkelstein's second calculation. In fact, the numbers align to support that calculation; $2,814,474 (anticipated profits) minus $1,554,080 (everything Fielding invested or owed) equals $1,260,394—the jury awarded Fielding $1,129,000. Because there is a reasonable basis for the damage award, we will affirm.

3. Punitive Damages

Friwat's only argument concerning the $200,000 punitive damage award is a single sentence at the conclusion of his brief stating the award was obviously infected by error and must be reversed. We deem the argument waived due to the complete lack of analysis or citation to legal authority. (*Kim, supra,* 17 Cal.App.4th at p. 979.)

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.